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September 29, 2010

E-FILE

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423-0001

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Office of Proceedings

SEP 29 2010

Part of
Public Record

Re: STB Finance Docket No. AB-1067, Kern Valley Railroad Company –
Termination of Trackage Rights – In Las Animas County, CO

Dear Ms. Brown:

Attached for e-filing is the Reply To Petition For Exemption submitted by
BNSF Railway Company.

If you have any questions, please contact me.

Sincerely yours,



Karl Morell

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. *AB-1069X*

KERN VALLEY RAILROAD COMPANY
-- TERMINATION OF TRACKAGE RIGHTS --
IN LAS ANIMAS COUNTY, CO

REPLY TO PETITION FOR EXEMPTION

ENTERED
Office of Proceedings

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Attorneys for:
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Dated: September 29, 2010

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. AB-1069X

KERN VALLEY RAILROAD COMPANY
-- TERMINATION OF TRACKAGE RIGHTS --
IN LAS ANIMAS COUNTY, CO

REPLY TO PETITION FOR EXEMPTION

BNSF Railway Company ("BNSF") hereby replies in opposition to the Petition For Exemption filed by Kern Valley Railroad Company ("KVR") with the Surface Transportation Board ("Board") on September 10, 2010 ("Petition"). As is demonstrated below, the Petition is procedurally flawed and, therefore, should be summarily denied.

BACKGROUND

KVR seeks the discontinuance of BNSF's trackage rights over a 2 mile segment of rail line located between Mileposts 0.0, near Jansen, CO, and Milepost 2.0, at Jansen (the "Line"). In ICC Finance Docket No. 32232, *Burlington Northern Railroad Company – Trackage Rights Exemption – Trinidad Railway, Inc.* (not printed), served January 29, 1993, the Board's predecessor, the Interstate Commerce Commission ("ICC") granted Burlington Northern Railroad Company ("BN") trackage over the rail line located between Milepost 0.0, near Jansen, and Milepost 30, east of Stonewall, CO ("BN Trackage Rights"). KVR acquired the 28-mile portion of rail line located between Milepost 2.0, at Jansen, and Milepost 30, east of Stonewall, from Trinidad Railway, Inc., in 2001. STB Finance Docket No. 33956, *Kern Valley Railroad Company – Acquisition and Operation Exemption – Trinidad Railway, Inc.* (not printed), served

November 21, 2000 ("*Kern Valley*").¹ Trinidad Railway, Inc., abandoned and BNSF discontinued its trackage rights over the rail line located between Milepost 2.0, at Jansen, and Milepost 30, east of Stonewall in STB Docket No. AB-573X, *Trinidad Railway, Inc. – Abandonment Exemption – In Las Animas County, CO*, and STB Docket No. AB-6 (Sub-No. 388), *The Burlington Northern and Santa Fe Railway Company – Discontinuance of Trackage Rights Exemption – In Las Animas County, CO*.

REPLY

KVR seeks the adverse discontinuance of BNSF's trackage rights over the Line through a petition for exemption under 49 U.S.C. § 10502. The ICC and the Board have recognized that a third-party may seek to abandon or discontinue the rail operations of an incumbent railroad. *See Western Stock Show Assn. – Aban. Exemption – In Denver, CO*, 1 S.T.B. 113, 131 (1996). The ICC and Board, however, have consistently held that an adverse abandonment or discontinuance may not be processed by an exemption. *See e.g.*, STB Docket No. AB-12 (Sub-No. 190X), *Southern Pacific Rail Corporation – Abandonment Exemption – In Garfield, Eagle And Pitkin Counties, CO* (not printed), served June 10, 1996, *slip op.* at 1 (a "person other than a railroad seeking a determination by the Board that the public convenience and necessity requires or permits the abandonment or discontinuance of a line of railroad must file a formal application...."); ICC Finance Docket No. 32103, *Milford-Bennington Railroad Company, Inc. – Trackage Rights Exemption – Boston and Maine Corporation – And Springfield Terminal Railway Company* (not printed), served September 3, 1993, *slip op.* at 2, note 3 ("the exemption

¹ KVR claims that it acquired the entire 30-mile rail line. Petition at 1. In *Kern Valley*, however, the Board only authorized KVR to acquire the portion of the line located west of milepost 2.0 and BNSF has not been able to locate any Board authorization for the acquisition of the line by KVR east of Milepost 2.0.

alternative under [former] 49 U.S.C. 10505 is not available for adverse abandonments or discontinuances”); ICC Finance Docket No. 31271, *City of Colorado Springs and Metex Metropolitan Dist. – Pet. For Declar. Order – Aband. Determination* (not printed), served March 31, 1989; Finance Docket No. 31486, *Southern Pacific Transportation Company – Discontinuance of Service – In San Francisco County, CA* (not printed), served September 12, 1989; ICC Finance Docket No. 31303, *Wisconsin Department Of Transportation—Abandonment Exemption* (not printed), served December 5, 1988, *slip op.* at 3-4 (“we do not think that our exemptive power authorizes us to require a carrier to take a particular action against its will”). *See also, Brae Corp v. United States*, 740 F.2d 1023 (D.C. Cir. 1984). Accordingly, the Petition is procedurally flawed and should be denied.

Even if KVR were to file a discontinuance application, Board precedent would compel the denial of the application on substantive grounds. A third party seeking an adverse discontinuance has the burden of demonstrating that the public convenience and necessity require or permit the discontinuance. *Chelsea Property Owners – Aban. – The Consol. R. Corp.*, 8 I.C.C.2d 773 (1992) (“*Chelsea*”), *aff’d sub nom Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994). The ICC and the Board have generally denied adverse abandonment and discontinuance applications whenever there was a potential for continued operations. The function of the Board’s “exclusive and plenary jurisdiction over a trackage rights discontinuance is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service.” STB Docket No. AB-103 (Sub-No. 14), *The Kansas City Southern Railway Company – Adverse Discontinuance Application – A Line Of Arkansas And Missouri Railroad Company* (not printed), served March 26, 1999, *slip op.* at 7. *See also* STB Docket No. AB-400 (Sub-No. 4), *Seminole Gulf Railway, L.P. – Adverse*

Abandonment – In Lee County, FL (not printed), served November 18, 2004 (adverse abandonment application denied because railroad was actively seeking new business for the line); STB Docket No. AB-33 (Sub-No. 183), *Salt Lake City Corporation – Adverse Abandonment – In Salt Lake City, UT* (not printed), served March 8, 2002 (adverse abandonment application denied even though railroad had not operated over line in more than 2 years, but expressed an intent to use the line in the future); STB Docket No. AB-600, *Yakima Interurban Lines Association – Adverse Abandonment – In Yakima County, WA* (not printed), served November 19, 2004 (adverse abandonment denied even though the line had been out of service for years and was in serious disrepair because there was a potential for future rail service). The Board has a statutory duty to preserve and promote continued rail service where the railroad expresses a desire to continue operations and has taken reasonable steps to acquire traffic. *See Chelsea* at 779.

KVR asserts that BNSF has not utilized the Line in 2 years. KVR, however, fails to inform the Board that the nearby coal mine will be reopened by Cline Mining Corporation in the very near future. *See Exhibit 1.* The coal mine contains 315,000,000 tons of compliant in-place metallurgical steel making and thermal grade coals. The coal mine is expected to reopen in the fourth quarter of 2010. It is no small coincidence that KVR seeks to remove BNSF from the Line prior to the opening of the mine so as to inhibit BNSF's ability to handle traffic from the mine. If the Petition is denied and KVR files a discontinuance application, BNSF will vigorously oppose the application on grounds that the trackage rights are necessary for BNSF's participation in the new coal traffic moving from the nearby mine.²

² It also appears the KVR does not have standing to file an adverse discontinuance application, since KVR apparently never obtained Board authority to acquire the Line.

Finally, KVR seeks the adverse discontinuance of the BN Trackage Rights, which KVR claims has a 3 months cancelation provision. KVR fails to mention, however, that another BNSF predecessor, The Atchison, Topeka and Santa Fe Railway Company ("ATSF"), also obtained trackage rights over the Line. See ICC Finance Docket No. 32228, *The Atchison, Topeka And Santa Fe Railway Company – Trackage Rights Exemption – Trinidad Railway, Inc.* (not printed), served January 13, 1993 ("ATSF Trackage Rights"). The Trackage Rights Agreement between ATSF and Trinidad Railway, dated November 30, 1992, can only be terminated by ATSF. Thus, even if KVR were successful in having the BN Trackage Rights discontinued, BNSF would continue to have trackage rights over the Line pursuant to the ATSF Trackage Rights.

CONCLUSION

BNSF respectfully urges the Board to deny the Petition.

Respectfully submitted,



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Dated: September 29, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2010, I have caused a copy of the forgoing Reply to be served on all parties of record by first class mail.


Karl Morell

THE TRINIDAD TIMES

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This Week's Poll

Trinidad's city council is contemplating buying a clubhouse for the Trinidad Municipal Golf Association. Do you think the city should buy one?

New Elk Mine on schedule for fall opening

Randy Woock, Staff writer, TTI • May 25, 2010

Cline Mining Corporation reports that aboveground and underground upgrades to the New Elk Mine west of Trinidad have been successfully installed in anticipation of the mine's resumption of operations in the fall.

The rehabilitation of the mine infrastructure was begun in earnest on April 22, with the the Canadian company reporting that it has completed the installation of roof support structures in two thirds of the mine's access slopes to its estimated 315 million tons of coal.

"These access slopes allow coal to be transported out of the mine and preparations are now being made for the installation of a conveyor system capable of transporting coal at a rate of 4,200 tons per hour," the company reported. "Rehabilitation and upgrading of surface infrastructure has now begun on schedule with crews on site accessing existing equipment and preparing for installation of new processing equipment."

The New Elk Mine was opened in 1951 by the CF&I Steel Company. It was then sold to Wyoming Fuels in 1981, which operated the mine until 1989. The mine's coal preparation plant was utilized by other mines until 1996.

The company also reports having a working staff of 60 employees at the mine, half of which were reported as local hires. Chief Operating Officer Dennis Mraz told a mid-April gathering of Las Animas County government and business representatives that it anticipated hiring about half of its expanded workforce of 450 employees from local areas.

Cline President and Chief Executive Officer Kenneth Bates stated that the company was "committed to responsible stewardship" in its economic impact on the local community.

Additionally, the company reports having established working relationships with about 10 area businesses to contract for supplies and services, though The Times Independent was unable to confirm that number with local sources.

Michael Aragon of the Trinidad-Las Animas County Economic Development, Inc. told The Times Independent that while ED did offer myriad services to corporations moving into the area — such as facilitating business-to-business interactions — it had not yet been approached by Cline for such assistance.

A call to Cline's administrative offices for additional information was not returned by press time.

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EXHIBIT 1

